Supreme Court, U.S.

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NO.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Pierce County
Prosecuting Attorney
By
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QUESTIONS PRESENTED FOR REVIEW

1. Where a suspect verbally opposes police while at the same time he physically commits a crime, does the First Amendment overcome the Fourth Amendment to shield him from arrest?

2. Where a Circuit Court interprets certain police conduct as unconstitutional but a state court upholds it under the same federal provision, do police of that state violate "clearly established" rights and lose their qualified immunity by relying on their state court's precedent?

3. May a party fail to object to an instruction and then have the jury's verdict overturned where he never appraises the trial court of the claimed error and affirmatively misleads it on the issue?

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I. REPORTED OPINIONS

The Ninth Circuit Court of Appeals opinion in this case is published at Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998).

II. JURISDICTION

The opinion of a divided Ninth Circuit Court of Appeals was entered on February 27, 1998. App. "A." Rehearing was denied in another split decision on April 9, 1998. App. "B." This Court now has jurisdiction under 28 USC § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. Constitutional Amendment I
(See Appendix "C" for text.)

B. U.S. Constitutional Amendment IV
(See Appendix "C" for text.)

C. 42 U.S.C. § 1983
(See Appendix "C" for text.)

IV. STATEMENT OF THE CASE

Herron Island is located in Puget Sound, just within the boundaries of Pierce County, Washington. Because the island is

isolated and privately owned, a minority of its residents oppose the presence of law enforcement and oppose their neighbors who want more frequent police patrols. Ex. 12 at 3; CR 164 at RT 5, 37-41, 48, 118-19, 123, 247-48, 307-08, 601.[1] In the past this group's disturbing the peace and threatening others had fostered many calls to and visits by the Pierce County Sheriff's Department (hereinafter "PCSD"). CR 164 at RT 43-47, 61, 306-07, 371, 377-83. However when the group's misconduct escalated dangerously in the summer of

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[1] Herein Clerks Papers are referred to as "CR" followed by the applicable document number from the District Court Docket Sheet, Jury Instructions are referred to as "CR 146" -- the applicable document number -- followed by "Inst." and the pertinent instruction number, exhibits are referred to as "Ex." followed by the number given it in the District Court, and the reporter's transcript is referred to as "CR 164" -- the applicable document number -- followed by "RT" and the pertinent page number.

1992,[2] PCSD initiated a policy against any unit traveling to Herron Island alone after dark and even then there were always unresolved safety concerns. Id at 121, 126, 376-77, 669, 741-42, 744-45.

On the evening of September 6, 1992 -- Labor Day weekend -- PCSD received a hysterical telephone report by the wife of a Heron Island resident earlier threatened by the group in question that her family just had been threatened again by a member of a

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[2] On July 4th, a large hostile drunken crowd on the island's beach refused to extinguish a fire and by sheer weight of numbers forced a fire official and a PCSD deputy to retreat without enforcing the law. CR 164 at RT 47-48, 121-22, 266-69, 634-35, 743-44. On August 14, PCSD again responded when an island resident was threatened with a knife by a member of a loud party on the beach. Id at 51, 522-28, 661-65. The next day, on August 15, PCSD again was dispatched when many of the same persons involved in the July 4th incident retaliated against the victim of the knife threat by blaring radios at his home, yelling for him to move and shinning a spotlight into his windows. Id at RT 57-58, 123-24, 202-05, 308-10, 607-09, 638-39, 665-71, 745-50; Ex. 12 at 3.

drunken party at the beach. Id at RT 438-44, 530-33, 643-44, 673-75; Ex. 13 at 1. However the only available Deputies -- Thrash, Larson and Donnelly -- were not dispatched until PCSD learned from the fire district that "J.D." -- a member of this party -- had now threatened fire fighters who had attempted to extinguish an illegal fire. CR 164 at RT 10-11, 65, 129; Ex. 11; Ex. 13 at 2; Ex. A-29.

Upon arriving on the island, Deputy Thrash learned from a family on the beach that no one had left the group since the firemen had departed. CR 164 at RT 136, 759-60; Ex. 12 at 4. Approaching next the drunken group, which outnumbered the officers approximately four or five to one and which was made up of many of the same persons as those at previous calls, CR 164 at RT 34, 44, 58-60, 69, 136, 139-40, 273, 646, 676, 762; Ex. 12 at 4, Deputy Thrash repeatedly ordered those around the illegal

fire to leave. CR 164 at RT 27-28, 138, 286-88, 620, 647-48, 677-78, 759-60; Ex. 12 at 4; Ex. 14 at 2. When no one obeyed, Deputy Thrash called for J.D. to make himself known but was falsely told by members of the crowd that J.D. had left long ago. CR 164 at RT 28, 72-75, 289-93, 316-17, 547, 622-23; Ex. 10; Ex. 12 at 4; Ex. 13 at 2.

Knowing no one had left before his arrival, Deputy Thrash more forcefully told the drunken crowd he was "tired of this shit" and that the "party is over" but again frighteningly no one -- including plaintiff Herbert Gulliford -- obeyed. CR 164 at RT 28, 138, 140, 318-319, 764-766; Ex. 10; Ex. 12 at id; Ex. 13 at id. Instead they became increasingly "rebellious," a woman began to argue and Gulliford from the back of the crowd -- with the admitted intent of preventing J.D.'s arrest -- interrupted by yelling profanities and telling the deputies to "hop on the ferry -- go back."

CR 164 at RT 29, 76, 137, 141-44, 294-95, 321-25, 506-08, 515-19, 624-25, 766-68, 822-23; Ex. 10; Ex. 12 at id; Ex. 13 at id.; Ex. 14 at id.

Having no available back up,[3] Deputy Thrash in response to plaintiff's physical and now verbal refusal to obey a lawful order could 1) do nothing and let plaintiff's call incite the crowd to physically force the deputies off the island as it had before, 2) "hop" back on the ferry as he was told and abandon his duty to disperse the crowd, to arrest a felon and to assist firemen extinguishing the fire, or 3) arrest Gulliford for failing to disperse and obstructing so that the investigation could continue. CR 164 at RT 768, 770. Deputy Thrash chose to arrest plaintiff.

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[3] Reinforcement was unavailable because the island was isolated, personnel limited and broadcasts to the dispatcher difficult to send. CR 164 at 119-20, 122, 125-28, 533-37, 744-45; Ex. A-22.

Gulliford however ducked away and intentionally fell to a sitting position amidst his increasingly agitated friends, resisted being handcuffed for several minutes -- during which time he asked the hostile circling crowd for assistance -- but finally was overpowered and taken into custody. CR 164 at RT 79-81, 86, 114-15, 148-50, 161-62, 166, 218-19, 221, 303, 335-36, 338, 340-41, 408, 549-50, 553-54, 561, 569, 593-94, 596, 651, 695-702, 707-09, 717, 737, 778-80, 783-84, 786-88, 793, 801, 810-11, 815, 825; Ex. A-31.

Plaintiff thereafter filed suit under 42 USC § 1983 for unlawful arrest and excessive force but -- after a three week trial -- the jury returned a defense verdict on all issues. Gulliford v. Pierce County, 136 F.3d 1345, 1347 (9th Cir. 1998). Plaintiff then appealed to the Ninth Circuit Court of Appeals which unanimously affirmed the defense verdict on ex-

cessive force but in a split decision reversed the jury's verdict in favor of Deputy Thrash on unlawful arrest and remanded that issue for retrial. Id. Deputy Thrash now seeks a writ of certiorari.

V. ARGUMENT

1. THE FIRST AMENDMENT DOES NOT MAKE A SEIZURE ILLEGAL IF THERE IS PROBABLE CAUSE TO ARREST FOR PHYSICAL ACTS.

The evidence before the jury established Gulliford was arrested because he purposefully attempted -- by words and deeds -- to impede officers' attempts to perform their duties under tense and threatening circumstances. Before plaintiff said a word he had violated RCW 9A.84 .020 by failing to disperse when ordered to do so while congregating with a group of three or more and there had been acts of conduct within that group which created a substantial risk of causing injury to any person, or substantial harm to property.

CR 164 at RT 27-28, 138, 286-88, 316-19, 620, 647-48, 677-78, 759-60; Exs. 12-14. Plaintiff also thereafter "hindered, delayed or obstructed" the deputies under RCW 9A.76.020 because -- when Gulliford chose to remain and call out to the deputies -- the officers were attempting to disperse the crowd and arrest a suspect in a serious felony yet were being lied to by the crowd as it harbored the felon as well as being opposed by that crowd which had a known history of threatening behavior toward citizens and officials. Exs. 12-14.

Nevertheless, the jury's verdict in favor of Deputy Thrash on the claim of unlawful arrest was reversed and remanded for retrial because the Ninth Circuit held the jury should be instructed only "that under the First Amendment an individual cannot be arrested for mere speech unless the speech constitutes `fighting words'" and that "all that Gulliford did" was speak. Gulliford

v. Pierce County, 136 F.3d 1345, 1350 (9th Cir. 1998).[4] This published ruling -- making criminal conduct accompanying speech irrelevant to probable cause -- decides an important federal question vital to law enforcement that conflicts with decisions of both this Court and of the State of Washington. Supreme Court Rule 10(a) & 10(c).

Though Gulliford's words certainly had

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[4] The trial court's instruction explained the "First Amendment protects the right of citizens to verbally oppose **and /or** challenge police action without risking arrest...." CR 146, Inst. 15 (emphasis added). It thereby expressly distinguished "verbal opposition" from other "challenges" which are not "verbal opposition" but which may still be protected. The instruction then stated a person can be lawfully arrested if "that challenge" -- but not the previously distinguished "verbal opposition" -- takes the form of obstructing an officer. Id. Hence under the express terms of the instruction "verbal opposition" is absolutely protected and cannot be a basis for probable cause. Though this ignored that even words alone can constitute probable cause, 136 F.3d at 1350, such was only to plaintiff's benefit by depriving Deputy Thrash of this additional ground for upholding the arrest.

the potential to incite the mob,[5] case law makes clear speech can be a consideration for probable cause even where it does not constitute "fighting words" if it accompanies criminal conduct. In Houston v. Hill, 482 U.S. 451, 462 n. 11, 96 L. Ed.2d 398, 107 S.Ct. 2502 (1987), this Court indicated that "a municipality constitutionally may punish an individual who chooses to stand near a police officer and persistently attempt[s] to engage the officer in conversation while the officer is directing traffic" or who "run[s] beside [an officer pursuing a felon] in a public street shouting

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[5] See e.g. United States v. Hoff, 22 F.3d 222, 224 (9th Cir. 1994)(Where -- among other things -- an officer was "outnumbered, exposed, isolated and confronted by a previously and increasingly uncooperative individual," that individual's refusal to leave a campsite and inducement of a dog tethered to a tree to growl at the officer was "[m]ore akin to the cocking of a trigger than to privileged speech" and like "the incitement of a mob to riot ..., thus fails to reach the constitutional threshold.")

at the officer." Similarly, Washington cases have held -- where the scene also was noisy and confused and a crowd angry -- that the First Amendment is not implicated when an individual's attempts to talk to officers about the arrest of another member of the party after being told to leave was conduct that hindered, delayed and obstructed the officers and interfered with the discharge of their duties in violation of RCW 9A.76.020. See State v. Lalonde, 35 Wn.App. 54, 61-62, 655 P.2d 421 (1983). Indeed, where a plaintiff was arrested because he consistently refused to comply with official directions and instead asked "why" he was being so directed, even the Ninth Circuit rejected a First Amendment challenge because incidental restrictions on freedom of speech are not invalid if the prohibited conduct contains both speech and non-speech elements and the law regulates the non-speech conduct. United States v.

Brice, 926 F.2d 925, 931 (9th Cir 1991). See also Cox v. Louisiana, 379 U.S. 536, 555, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965) citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949)("it has never been deemed an abridgement of freedom of speech ... to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); Mozzochi v. Borden, 959 F.2d 1174, 1179-80 (2nd Cir. 1992)(claim of retaliation for exercising free speech rejected where there was probable cause to believe a threat had been made); United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir.), cert. denied 493 U.S. 1082 (1987)(illegal conduct "is not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action."); Armes v. Philadelphia,

706 F. Supp. 1156, 1163 (E.D. PA 1989)(to succeed on a claim he was arrested for exercising free speech, plaintiff "must show [he] was arrested without probable cause.")

The Ninth Circuit's published decision here not only questions the enforceability of obstruction statutes in general but throws into confusion an officer's ability to arrest a suspect who is astute enough to accompany his illegal acts with verbal opposition to the arresting authority. Such harmful precedent has far reaching implications for both law enforcement and future claims under 42 U.S.C. § 1983.

2. CLEARLY ESTABLISHED STATE PRECEDENT REQUIRES QUALIFIED IMMUNITY

Qualified immunity exists where an officer's actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457

U.S. 800, 818, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982). See also Anderson v. Creighton, 483 U.S. 635, 641, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). This defense exists because:

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable.

Anderson, 483 U.S. at 641. To overcome this immunity a plaintiff must do more "than identify a clearly established legal test and then allege that the defendant has violated it" but "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir.

1990)(emphasis added).

As previously noted, the majority on the Ninth Circuit panel held Gulliford's non-verbal actions before and during his accompanying verbal outburst were constitutionally irrelevant and that once plaintiff spoke Deputy Thrash could only have probable cause if plaintiff used "fighting words." In its summary analysis of qualified immunity,[6] the majority did not address the "prior law" of this Court in Hous-

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[6] The majority also opined Deputy Thrash had waived his right to assert qualified immunity because he "neglects to explain why it did not cross appeal on this issue from the district court's denial of its motion seeking qualified immunity" and that an "appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights." 136 F.3d at 1351. However, Deputy Thrash prevailed on all issues below so that his reassertion of qualified immunity on appeal was not made "with a view toward enlarging [his] own rights" but in light of the rule that a jury's verdict will be affirmed on any ground supported by the record. See United State v. Washington, 969 F.2d 752, 755 (9th Cir. 1992), cert. denied, 113 S. Ct. 1945 (1993).

ton v. Hill, 482 U.S. at 462 n. 11, or even its own precedent of United States v. Brice, 926 F.2d at 931, discussed and cited above, which demonstrate no reasonable officer would have believed it violated the constitution to make an arrest when a suspect's illegal physical act is accompanied by verbal opposition to police. In so doing, the Ninth Circuit majority committed the same error this Court identified in Anderson v. Creighton, 483 U.S. at 640-41:

> The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right [defendant] was alleged to have violated ... was clearly established. The Court of Appeals specifically refused to consider the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause ....

(Emphasis added). Under the federal precedent cited but ignored by the Ninth Circuit majority, Deputy Thrash had every reason to

believe plaintiff's "conduct in question" under the tense and threatening circumstances would be held to constitute a failure to disperse and to create a "clear and present danger" of preventing the deputies from dispersing the crowd and arresting a felon -- i.e. "a substantive evil" far greater than Hill's hypothetical impeding traffic and similar to its example of an appropriate obstructing arrest.

More immediately, Deputy Thrash's own state's decision in State v. Lalonde, 35 Wn.App. at 61-62, had been decided under similar facts as those here and would have led any reasonable Washington policeman to believe plaintiff's conduct of remaining and communicating both his intent to remain as well as his intent the deputies instead should leave, were "acts which accompanied his words." Hence any Washington policeman would believe Gulliford constitutionally could be arrested for failing to disperse

and attempting to obstruct their efforts to disperse the crowd and arrest a felon. However the majority refused even to discuss the Washington precedent cited it, presumably because the Ninth Circuit only considers state law "in the absence of binding precedent." See Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985).

Such ignores that Washington precedent is "binding" on Deputy Thrash and that under such an analysis the same action brought in state court would ignore circuit court precedent and inconsistently consider only what law was "clearly established" by state court decisions. See ASARCO Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989)(state courts "possess the authority ... to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 375-76, 113 S.

Ct. 838, 122 L.Ed.2d 180 (1993)(THOMAS, J., concurring)("neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.") See also Arizonans for Official English v. Arizona, __ U.S. __, 137 L.Ed.2d 170, 117 S.Ct. 1055, 1076 n. 11 (1997)(Ninth Circuit's belief state courts are not "coordinate and co-equal with the lower federal courts on matters of federal law" deemed "remarkable.") If state precedent interpreting federal law is not considered in deciding what is "clearly established" -- regardless of which court a plaintiff chooses to decide his claim -- forum shopping will decide outcomes and qualified immunity will become meaningless because state officials then cannot "reasonably anticipate when their conduct may give rise to liability for damages...." C.f. Davis v. Sherer, 468 U.S.

183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

Though this Court has held a "court engaging in review of a qualified immunity judgment should therefore use its `full knowledge of its own [and other relevant] precedents,'" Elder v. Holloway, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344(1994) quoting Davis v. Sherer, 468 U.S. at 192 n. 9(emphasis added), it has never specifically addressed the role state court precedent on federal questions has in analyzing whether a right is "clearly established" for purposes of qualified immunity. C.f. Harlow v. Fitzgerald, 457 U.S. at 819 ("we need not define here the circumstances under which `the state of the law' should be `evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court."). But see O'Connor v. Donaldson, 422 U.S. 563, 577, 95 S.Ct. 2486, 45 L.Ed.

2d 396 (1975)(circuit court reversed because it "did not consider ... [defendant's] claimed reliance on state law" for purposes of qualified immunity). Though a federal appellate court has the ability to reconsider its precedent and interpret that of this Court, in analyzing qualified immunity it cannot ignore state precedent concerning federal questions which far more meaningfully and immediately govern a state official's conduct.

Because it has not been decided, but should be, what case law determines whether a right is "clearly established," certiorari should be granted to determine if a state officer is liable where he relies on his state's decisional law on federal constitutional rights. Sup. Ct. R. 10(c).

3. A JURY'S VERDICT SHOULD NOT BE REVERSED ON AN INSTRUCTIONAL ERROR NOT RAISED AT TRIAL.

As noted by the dissent, plaintiff at trial objected only to the absence of a se-

parate First Amendment claim and not -- as he later asserted on appeal -- that the court's instruction failed to state the First Amendment prevents verbal opposition from constituting probable cause under the Fourth Amendment. 136 F.3d at 1352-53 (O'Scannlain, dissenting); CR 167 at RT 3-4. Because a party may not object to an instruction on one ground at trial and rely on a different ground on appeal, Coastal Distributing Co v. NGK Spark Plug Co., 779 F.2d 1033, 1039 (5th Cir. 1986); Siegfried v. Kansas City Star Co., 298 F.2d 1, 7 (8th Cir. 1962), the issue was not properly before the Ninth Circuit. Fed.R.Civ.P. 51.

Though the majority opinion acknowledged "the precise articulation of Gulliford's First Amendment argument was not as artfully presented in his oral objection" to the District Court's instruction "as it was in his alternative jury instruction," 136 F.3d at 1349 n. 5, it concluded his

failure to properly object nevertheless comes within the "limited [useless formality] exception" to Civil Rule 51 where "(1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." Id at 1620; Glover v. BIC Corp, 6 F.3d 1318, 1326 (9th Cir. 1993); United States v. Payne, 944 F.2d 1458, 1464 (9th Cir. 1991), cert. denied, 503 U.S. 975 (1992).

But, as the dissent observed, "apart from noting that Gulliford submitted an alternative instruction ..., the majority does not point to anything in the trial record to support its conclusion that the pointless formality exception to Rule 51 applies here."[7] 136 F.3d at 1353. The Ninth

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[7] As to whether "throughout the trial the party argued the disputed matter

Circuit previously held, and the Seventh still holds, the filing of an alternative instruction is not enough to comply with Rule 51 and preserve an issue for appeal. See Hebron v. Touhy, 18 F.3d 421, 424 (7th Cir. 1994); Gosvenor Properties Ltd v. Southmark Corp., 896 F.2d 1149, 1152-53 (9th Cir. 1990); Benigni v. Hemet, 879 F.2d 473, 475-76 (9th Cir. 1988).

More bothersome, plaintiff's statements to the trial court led it to affirmatively believe he had no objection to the language actually used in the instruction.

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with the court," the majority refers only to "additional discussions [that] occurred off the record in chambers," 136 F.3d 1349, but nothing indicates those off the record discussions included the issue raised on appeal. Rather, until now "remarks made by counsel in chambers ... and mere submission of proposed instructions did not clearly show that the issue was focused before the court." Gosvenor, id. As to the second requirement it be "clear from the record that the court knew the party's grounds for disagreement with the instruction," the record, as shown below, proves the opposite.

The entirety of plaintiff's assertions at trial regarding the instruction was that it "does not include a claim for a specific First Amendment violation ...." CR 162 at RT 2-3 (emphasis added). The trial court responded that though the "First Amendment is implicated," it "is my judgment that that is not a separate claim." Id. (emphasis added). After being told the trial court understood his objection only to be that he sought an additional "separate claim," plaintiff made no further comment on that instruction nor took exception to the rejection of his proposed alternative despite a specific request he do so. Id; CR 167 at RT 10. Thus plaintiff's comments misled the trial court into believing he had no objection to the language actually used in the court's instruction.

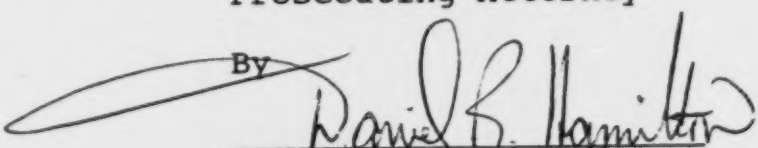
The division between the circuits on whether Rule 51 grants appellate courts such discretion to reach instructional

issues never before raised at trial, see 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2558, at 468 n. 14 (1994), a[illegible]e warrants certiorari. Supreme Court Rule 10(a).

VI. CONCLUSION

For the above reasons it respectfully is requested this Court grant certiorari.

JOHN W. LADENBURG
Prosecuting Attorney

By 

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